FOR ARGUMENT

Supreme Court, U.S.
FILED
OCT 30 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1183

CARBON FUEL COMPANY,

Petitioner,

v.

UNITED MINE WORKERS OF AMERICA; DISTRICT 17, UNITED MINE WORKERS OF AMERICA; AND LOCAL UNIONS NOS. 6572, 7626 AND 2236; UNITED MINE WORKERS OF AMERICA, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONER

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Respondents.

I. THE QUESTION PRESENTED

Respondents'[1] Brief (R.B. pp. 1, 2) mistates the legal issues in this case, and addresses instead a factual issue which was decided against them by the jury in the District Court. The Unions cast the issue as whether national labor policy in general, and the agreements here in question in particular, impose an implied duty upon a union, signatory to an agreement containing a no strike clause, to impose *discipline* upon members and subordinate branches which breach that clause. That issue was not decided by the District Court; was not ruled upon by

[1]Hereafter, Carbon will adhere to the designations of parties in its original brief (i.e. Petitioner Carbon Fuel Company, "Carbon"; International Union, United Mine Workers of America, "International"; District 17, "District" Local Unions No. 6572, 7626 and 2236, "Locals"; all the Labor Organizations, "Unions") and follow Respondents designation of the International and District as "UMWA."

the Court of Appeals; was not raised in the petition for certiorari, or the Unions' Brief in opposition to it; is not raised by the record in this case; and is not the issue before this Court. Rather, the issue before this Court is whether unions signatory to such agreements have an obligation to use all reasonable means to prevent and end strikes by members and subordinate branches in violation of the agreements, as has been held by the Third[2] and Eighth[3] Circuits, or whether a union so signatory, so long as it did not bring about or prolong the strike, can, with impunity, do "nothing", as the Court of Appeals held in this case. See Petition for Writ of Certiorari, Appendix at pp. 9-10 (Pet. A. pp. 9-10). The split between the Circuits on this issue apparently motivated this Court to grant certiorari. This is the issue to be decided.

It is not Carbon's position that this Court should rule the judgments in question to be proper because the UMWA did not discipline strikers. Rather, those judgments are proper and should be reinstated because the jury, upon proper instruction, decided that UMWA did not exercise "all reasonable means" to prevent and terminate the strikes. Whether the jury found that the means which should have been exercised involved discipline or one or more of various means available to UMWA cannot be determined from the general jury verdict. What is clear from that verdict is that the jury found that UMWA did not exercise "all reasonable means." Therefore, UMWA's emphasis on discipline, both in the issues portion and all other portions of its brief, is essentially directed at an argument that under

[2] *United States Steel Corp.* v:. *UMWA*, 593 F.2d 201, 209 (3rd Cir. 1979).

[3] *Wagner Electric Corp.* vs. *Local 1104*, 496 F.2d 954, 956 (8th Cir. 1974); followed in *Iowa Beef Processors* vs. *Amalgamated Meat Cutters*, 597 F.2d 1138, 1145 (n.14), (8th Cir. 1979).

the circumstances of these cases discipline would not have been reasonable. That argument was made to, and rejected by the jury, and has not been made since, until now. It has no place here.

II. STATEMENT OF THE CASE

UMWA's statement is occasionally misleading. Its contention that the "main function of the International Union is to negotiate wage agreements" while the districts "negotiate memoranda of understanding with coal companies * * *, and handle grievances which are not settled at the local level", and the locals "conduct the day-to-day affairs of the Union at each mine" (R.B. pp. 2, 3), is superficial and misleading. As the record shows, the International, not the Districts or Locals, is the exclusive bargaining representative of the production and maintenance employees of all of the operators who bargain with the Union (A. 28, 29); all of the employees are members of the International (A. 194); the International bargains and negotiates the collective bargaining contracts with the operators, with only such participation of its subordinate branches as it has established and permitted; and it enters into and signs the National Bituminous Coal Wage Agreements (A. 28, 29). The International is *the* Union bargaining representative and *the* contracting party, and the promises and commitments contained in the agreements are *its* promises and commitments. Moreover, the International has "supreme legislative, executive and judicial authority over all members and subordinate branches" (A. 194), and as such, exercises ultimate Union control over the implementation and administration of the agreements.

UMWA further argues in their "Statement" (R.B. pp. 4, 5), and throughout their brief, that their routine

procedure of sending District representatives to Local union meetings to advise members that "the strike was unauthorized, and against union policy," and that the members should return to work, without any further action on their part, was the only means, among all of the means available to them, reasonable for use in attempting to end the strikes. Thus, UMWA argues that the fact the majority of the strikes "lasted only one to two days," and that none lasted more than "five or six days," establishes that the limited procedures used were successful, and requires a conclusion that those procedures constituted reasonable means of dealing with the strike problem (R.B. pp. 4, 5, 9).[4] In this same vein, UMWA further argues Carbon presented no evidence that other available means of ending the strikes would have produced better results; and they emphasize that union witnesses expressed the opinion that the use of various alternative means to prevent and end the strikes would have proven "counterproductive" (R.B. p. 5). Although nothing is said concerning any action taken by the International and District to prevent wildcat strikes, or to stop the continuing pattern and practice of such strikes, and the evidence shows none, UMWA asserts that the International "took all steps which it regarded as reasonable and effective to terminate [each strike]." R.B. p. 42.

UMWA's argument that the limited steps taken by them to end the strikes were the only reasonably means

[4]As the evidence in this case showed, and the jury's verdict reflects, a one or two day strike has a very significant impact on coal production and operating costs. When such strikes are engaged in in the numbers and with the frequency shown here, they become intolerably burdensome and economically disastrous to the interests of all concerned. It cannot reasonably be maintained that the fact that the strikes lasted only from one to five or six days each shows that the limited steps taken by the UMWA dealt effectively with the problem. Again, UMWA's argument that they used the only means which it was reasonable for them to use, was rejected by the jury's verdicts.

available to them, and that all other means would have been unreasonable, begs the question presented in this case. The question is not whether the means used by the International and District were reasonable; but whether they had a duty to use any reasonable means at all. The District Court submitted to the jury the question whether the procedure used by the UMWA constituted "all reasonable means" that should have been used by them in attempting to prevent and end the strikes. The jury resolved that question against them. The Court of Appeals did not reverse the Trial Court's judgment because it found, contrary to the jury, that the means used by UMWA were all that were reasonably required of them under the circumstances; but, because it held that the International and District had no duty to use *any* means to prevent or end the strikes. Pet. A. pp. 9, 10. UMWA's argument that the action taken by them constituted the only reasonable action that they could take under the circumstances is inappropriate in the present posture of this case.

UMWA states (R.B. p. 10) that: "The only action identified by Carbon which the UMWA did not take was that it did not discipline its members or revoke the charters of locals." This is not correct. It was shown in evidence that under the Constitution of the International Union, there was a variety of means and procedures available to the International and District in attempting to prevent and stop the strikes. Disciplinary action against members was only one of the means available. Others included disciplinary fines or penalties against the Locals, official reversal of the strike action of the Locals (A. 195), revocation of the charters of the Locals, and creation of "provisional governments" for the Locals. A. pp. 194, 195. Moreover, express constitutional

sanction certainly is not required for the International to take such action as instructing striking members that not only were the strikes "unauthorized", but also in violation of the contract and unlawful, and that picketing in connection with the strikes was also unauthorized and unlawful, and that members were to remain at work or return to work despite picketing.[5]

[5]UMWA's directives that striking members return to work never directed them to return despite unauthorized and unlawful picketing. They never ordered anyone to work at a mine that was being picketed (A. p. 38); and they never took any disciplinary or other action to stop or prevent such picketing (A. pp. 106-07; 133).

III. ARGUMENT

A. A UNION BOUND BY A COLLECTIVE BARGAINING AGREEMENT CONTAINING AN EXPRESS OR IMPLIED NO-STRIKE CLAUSE HAS THE OBLIGATION, WITHOUT MORE, TO USE ALL REASONABLE MEANS TO PREVENT AND END STRIKES BY ITS MEMBERS AND SUBORDINATE BRANCHES IN VIOLATION OF THAT CLAUSE.

The UMWA's argument is generally in reverse order to that in Carbon's brief—discussing the proper interpretations of the Agreements first (R.B. pp. 15-25) and then turning to the impact of National Labor Policy (R.B. pp. 25-47); whereas Carbon's organization, in its brief on the merits, was the opposite. This fact makes this reply brief difficult to organize so that the flow between the briefs is easily followed. Because Carbon believes its organization is the most logical, and makes the various points more easily understood, that organization will be retained here.

1. THE OBLIGATION TO USE ALL REASONABLE MEANS TO PREVENT AND END STRIKES IN VIOLATION OF THE CONTRACT ENCOURAGES, AND DOES NOT FRUSTRATE, FREE COLLECTIVE BARGAINING.

As was pointed out in Carbon's original Brief (pp. 21-26), and not controverted by UMWA, effective implementation of the policy of our national labor laws, to make collective bargaining agreements to settle disputes peacefully through grievance and arbitration procedures work, requires that such agreements be enforceable. The record in this case shows clearly that as to Carbon, the UMWA's solemn promise to settle disputes peacefully has not been enforceable; and in order to make such agreements enforceable, UMWA must be held to an obligation to use all reasonable means to prevent and end strikes by its members and subordinate branches in violation of that clause.

Respondents assert, to the contrary, that implying such an obligation would "frustrate" and "contravene" the National Labor Policy, because (1) it provides for "vicarious liability" for parent unions contrary to the rulings of the Court and the legislative history or § 301; (2) it threatens unions with existing liability in contravention of policy protecting their financial stability; and (3) it permits unwarranted interference by employers in unions' internal affairs. Moreover, UMWA supports these arguments with unwarranted and unsupported conclusions of fact, which have no basis in the record, or in actual fact. In its arguments relating to National Labor Policy, UMWA totally ignores the plain fact that if it, as the exclusive collective bargaining representative of all of its members, purporting to speak for them and all of

its subordinate branches at the bargaining table and holding itself out as able to bind them to the commitments it makes there, can escape all affirmative responsibility for compliance with such bargaining commitments upon the grounds that its unilaterally established internal structure relives it of any obligation to secure performance of its agreement, the collective bargaining process which is the cornerstone of National Labor Policy becomes meaningless and futile.

2. THE IMPLICATION OF AN OBLIGATION UPON UMWA TO USE ALL REASONABLE MEANS TO PREVENT AND END STRIKES IN VIOLATION OF THE AGREEMENT IS CONSISTENT WITH NATIONAL LABOR RELATIONS POLICY.

The requirement that the International and the UMWA use all reasonable means available to them to prevent and end wildcat strikes does no violence to traditional legal distinctions between parent unions and their membership and locals, and does not render the parent union "vicariously liable" for breaches of contract by its members and subordinate branches. Carbon does not claim that UMWA is liable for breaches by the Local of the *Local's* contract. Rather, Carbon seeks to hold the UMWA liable for breaches of a contract *it* made. The "all reasonable means" obligation does not make the UMWA liable on any theory of "vicarious liability." R.B. p. 28. It simply prescribes that it, as the exclusive bargaining representative of all of its members and the party making and entering into the Coal Wage Agreements, may be held liable for breaches of *its* agreement when *it* has failed to use all reasonable means available to it to assure compliance with the commitments *it* has made. The UMWA's liability it not purely derived or

based upon the relationship between the International and its subordinate branches, but upon its failure to comply with the contractual commitments which it has made.

Nor is the implication of such an obligation precluded by past decisions of this Court[6] or the legislative history of the Labor Management Relations Act of 1947. The legislative history of § 301 does not deal specifically with this issue, as contended by Respondents. It is clear from the legislative history that the Congress intended that unions be subject to suit for violations of no-strike clauses, so that such clauses would be enforceable and thus achieve their purpose to bring about labor peace during contract terms (see Carbon's original brief, pp. 21-24); and that in support of that goal, the provisions of Section 6 of the Norris LaGuardia Act (29 U.S.C. § 106), as interpreted and applied in *Carpenters* vs. *US*, 330 U.S. 395 (1947), are superseded by § 301(e), which establishes equal rules of responsibility for both management and labor. See R.B. pp. 30, 31. There was no extensive legislative consideration of how this new standard would be applied to the multiple and various situations in which strikes occur, or under the multiple and various differing structures of labor organizations and collective bargaining agreements. Rather, the discussion had was limited to charges by opponents to the bill that §301 would auto-

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[6] *United Mine Workers vs. Coronado Coal Co.*, 259 U.S. 334 (1921), relied upon at R.B. pp. 28-29 does not support the proposition that a labor organization, which is the exclusive collective bargaining representative of its members and which makes and enters into contracts in that capacity, has no duty to act affirmatively to prevent its members and subdivisions from violating the contract commitments which it has made as their representative. *Coronado, supra*, was a suit for damages for an alleged conspiracy in violation of the Sherman Act, and for the violent destruction of property in furtherance of a conspiracy by an independent district union seeking to organize a company. No question was presented in that case as to the obligation of the International, which was not a signatory to a contract, to take action to uphold its contractual commitments against violations by its members and subordinate branches.

matically make international unions liable for acts of members which they could not prevent or control,[7] to denials by supporters that such was the case,[8] and to statements that the purpose was to make unions and employers liable upon the same agency theory.[9]

Likewise, the colloquy between Senator Taft and Mr. Patterson relating to another similar bill, and quoted by UMWA at R.B. p. 33, does not establish any sort of congressional intent that a parent labor organization has no obligation to use reasonable means to see that its members and subordinate branches abide by a contract the parent has made. In that instance, as opposed to this case, the striking local was the sole signatory to the contract—the parent did not sign the contract but merely "approved" it. Hearings on S. No. 55, Senate Labor and Public Welfare Comm., 80th Cong., 1st Sess., p. 1551.

To the extent that this meager and scattered record of consideration by Congress of the potential liability of parent unions for acts of their members and subordinate branches does establish some sort of congressional purpose to protect such parents from liability, the implication of an "all reasonable means" obligation on those parent organizations does not contravene that policy. The UMWA was not held liable here for acts of its locals, but for its own failure to act. Had the UMWA acted reasonably to end the strikes (actions which were entirely within its discretion and absolute control), no liability on its part could or would have been found. Likewise, under the law as found by the District Court, no

[7]See remarks of Senators Killgore and Pepper, referred to in Respondents' Brief pp. 31, 32, n. 18, and the veto message of President Truman, 93 Cong. Rec. 7501, part 4.(6).

[8]See radio speech of Senator Taft, 93 Cong. Rec. A3232;

[9]See remarks of Senator Taft, 93 Cong. Rec. 6680.

other parent union would be liable because of actions beyond its control.

Moreover, an "all reasonable means" obligation is not inconsistent with the National Labor Policy of protecting unions from liability so as to maintain their "financial stability." R.B. p. 39. *International Brotherhood of Electrical Workers* vs. *Foust*, ____U.S.____, 99 S. Ct. 2121 (1979), does not stand for the proposition that the National Labor Policy expressed in § 301, to make collective bargaining agreements enforceable and labor organizations liable for breaches of contract, must be subjucated to considerations of "financial stability of unions." The *Foust* case, *supra*, is inapposite to the issue presented here. The question presented was whether the Railway Labor Act permitted an employee to recover punitive damages for breach of a union's duty of fair representation. No question was raised concerning a union's liability for compensatory damages. In *Foust*, *supra*, the Court pointed out that Congress had not specified whether punitive damages were available in such suits, and that it was therefore necessary that the Court decide whether awarding punitive damages "would comport with * * National Labor Policy" [Id. 2125]. The Court held that National Labor Policy would not be served by permitting "punitive damages, which, by definition, provide monetary relief 'in excess of * * * actual loss,' *Scott vs. Donald*, 165 U.S. 58, 86, 17 S. Ct. 265, 267, 41 L.Ed. 632 (1897), * * *." *Foust* in no way supports Respondents' argument that holding unions financially liable in compensatory damages for breach of contract is precluded by considerations concerning the depletion of union treasuries and a supposed resulting impairment of "the effectiveness of unions as collective-bargaining agents." R.B. p. 39.

Likewise, an "all reasonable means" obligation would not contravene the National Labor Policy of preventing employer interference with the internal affairs of unions. UMWA asserts that implying an obligation to use all reasonable means to prevent and end strikes in violation of the contract would permit employers "to dominate or interfere with the internal affairs of the Union." R.B. p. 40. Compliance with the contract's implied no-strike provision is not, however, an "internal affair" of the Union. On the contrary, it is the very heart of the collective bargaining relationship between the parties. The employer parties to the contracts are, of necessity, vitally concerned with the Union's performance of the agreements, and, therefore, with the efforts made, or not made, by the Union to secure compliance with its no-strike commitment. The actions of the Union, or the lack thereof, to secure performance of the no-strike commitment and maintain its "integrity" are clearly not matters dealing "only with the relations between the employees and their Union." R.B. p. 40.

Respondents say that their obligation to act to prevent and to stop violations of the implied no-strike clause is a non-mandatory bargaining subject, and that that 'the law would preclude the industry's insisting that the UMWA even bargain on the subject." *NLRB* vs. *Wooster Division, Borg-Warner Corp.*, 356 U.S. 342 (1958); R.B. p. 40. Even if it were to be assumed, *arguendo*, that the Union's obligation to prevent and stop such contract violations is a permisive bargaining subject only, the undisputed fact is that the Union did bargain and agree that "all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'settlement of disputes' article of this Agreement," and that it would "maintain the integrity of this con-

tract." The question is not whether the subject was a mandatory or permissive subject for bargaining; but rather the question concerns the legal effect of the provisions agreed upon. However, unlike the bargaining subjects at issue in *Borg-Warner, supra*, the subject of the obligation of the International to prevent and to stop violations of the implied "no-strike" provision of its contract with Carbon involves matters "between the employer and the employees", and does not deal "only with relation between the employees and their unions." [Id. 350].[10]

3. UMWA'S NATIONAL LABOR RELATIONS POLICY ARGUMENT IS BASED UPON FALSE FACTUAL PREMISES.

Finally, in its policy argument, UMWA makes unwarranted factual assertions which cannot be left unanswered. First, UMWA argues that the implication of an all reasonable means obligation amounts to a "rule of automatic UMWA liability for wildcat strikes" (R.B. p. 28); or constitutes the UMWA as "the guarantor of all industry losses from wildcat strikes" (R.B. p. 38). Con-

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[10] *Borg-Warner* does not support Respondents' claim that the action to be taken by a union to prevent violations of the "no-strike" clause is only a permissive bargaining subject. In *Borg-Warner* the Court upheld the Board's finding that the employer had violated its duty to bargain by insisting (1) that the Union agree to conduct a secret ballot vote of all employees on the company's last offer in contract negotiations; and (2) that the International Union not be a party to the contract, although it, not the Local, was the exclusive bargaining representative certified by the NLRB. In holding that the employer's "strike vote" demand was a nonmandatory bargaining subject, the Court said:

> [Id. 350] " * * * It settles no term or condition of employment — it merely calls for an advisory vote of the employees. *It is not a partial 'no-strike' clause. A 'no-strike' clause prohibits the employees from striking during the life of the contract. It regulates the relations between the employer and the employees. * * * The 'ballot' clause, on the other hand, deals only with relations between the employees and their unions.* * * * It enables the employer, in effect, to deal with its employees rather than with their statutory representative." (Emphasis supplied).

trary to the Respondents' contentions, the all reasonable means obligation does not hold the UMWA automatically liable as "guarantors" or "insurers" of employer losses during any and all wildcat strikes. The International and District are liable only if they failed to exercise all reasonable means available to them to prevent[11] or end the illegal strikes. If they do so, and an illegal strike occurs or continues nevertheless, they are not liable.

UMWA argues (R.B. p. 35) that "[t]he purpose of requiring . . . resort to the grievance procedure rather than strikes is served by the present remedies . . . of discipline, injunction or other legal action" against the locals and their members. That is simply not true. When all employees at the operation engage in the strikes, as happened here, a mass discharge or suspension of all participants, which is not discriminatory, patently closes down the mine even longer. Discipline of strike leaders by the employer is usually impossible, because the locals will not reveal who the strike leaders are and UMWA makes no effort to discover their identity, A, pp. 105-06; 131-32. Likewise, an injunction running only to the locals is ineffective because they are judgment proof.

UMWA says in their brief (R.B. 37) that if it is held to have an affirmative duty to secure compliance with its contractual commitment to settle disputes through the grievance and arbitration procedure, rather than by strikes, it will be discouraged from incorporating such arbitration clauses in future contracts. This is tantamount to a declaration that if it is going to be held to perfor-

[11]Contrary to UMWA's assertion (R.B. p. 38), the jury's verdict does not "inflict" damages from the commencement of the strike. In each instance, the verdict against UMWA was for lesser amounts than that against the responsible Locals or Local, indicating that the jury was assessing damages only for that period of time after the UMWA had an opportunity to take reasonable steps. See the Court's charge, A.200.

mance of its current contractual commitments, it may not make similar commitments in the future. Carbon submits that a contractual commitment secured in collective bargaining, that disputes and differences will be settled peacefully without strikes during the life of the agreement, is of little value, if it is effectively unenforceable, and without practical meaning or effect. A promise which is violated wholesale and cannot be practicably enforced is scarcely better than no promise at all. If the UMWA wants to bargain in the future for deletion of the arbitration clause, nothing can prevent it from doing so. However, its suggestion that it will negotiate the arbitration clause out of future contracts if it is held to a duty to use reasonable means to secure compliance with the clause is not a legally sound basis for relieving it from liability for failure to abide by its obligation in past agreements.

UMWA says (R.B. p. 42) that the "reasonable means" obligation is so "vague" and "all embracing" that UMWA cannot "possibly know in advance how to satisfy [that obligation]." Yet the obligation to act reasonably, and to take reasonable steps to avoid or remedy potential injury and damages to others, is a well known standard in the law. Courts and juries deal constantly with such standards. In situations in which the extent of one party's legal obligations to another necessarily depends on varying facts and circumstances, it is the only practicable standard. The alternatives are absolute liability or absolute immunity from liability. In this case neither alternative is consistent with national labor policy and the UMWA's expressed commitment to "maintain the integrity" of the contract and that "all disputes which are not settled by agreement shall be settled by the

machinery provided" in the contract grievance and arbitration provisions.

The International and District argue (R.B., p. 43) that their use of disciplinary or any other means of attempting to prevent and stop unauthorized strikes in violation of the contract would not eliminate strikes. They so argued to the jury. However, the jury obviously believed that the use of discipline or other means could have prevented or stopped the strikes involved in this case. Otherwise, they would hardly have found failure to use reasonable means. Thus, UMWA's argument that none of the available means of combating the strikes could have been effective was rejected by the trier of the facts. Moreover, UMWA cannot maintain that the means available to them would not have been effective since, although they repeatedly told their members and locals that they would use some of the available means, the record shows clearly that they made no effort to do so. An authority that constantly threatens but never acts is easily defied.

UMWA also argues that any affirmative action by it to induce or coerce members and locals not to violate the contract would interfere with union democracy and impinge upon the objective of the LMRDA [29 U.S.C. §§ 401 et seq.] that "democratic opposition be allowed to develop within [labor organizations]." R.B., p. 44. Again, there is no conflict between the national labor policies favoring internal union democracy and the enforceability of collective bargaining agreements to settle disputes between employers and employees and their union peacefully through grievance and arbitration procedures, rather than by striking. Union democracy does not require that the performance of collective bargaining agreements be

made conditional upon dissident union members' choice to keep or breach the promises made by their bargaining representative. Nothing in the LMRDA suggests that the contractual obligations of unions and their members to employers must be sacrificed to rights of internal union democracy.[12]

B. ASSUMING, ARGUENDO, THAT THERE WAS NO IMPLIED COMMITMENT ON THE PART OF THE UMWA TO USE ALL REASONABLE MEANS TO PREVENT AND END STRIKES IN VIOLATION OF THE CONTRACTS, SUCH AN OBLIGATION ARISES FROM THE TERMS OF THE CONTRACT ITSELF.

UMWA's argument as to the proper construction of the contracts is premised upon two[13] assumptions - (1) that the contract changes which were made in the 1947 and 1952 Agreements, whereby the express no-strike clause and the language obligating both parties to "exercise their best efforts through available disciplinary measures to prevent stoppages of work . . . ." were deleted, in 1947 and 1952 respectively, indicates that UMWA was intended to have no obligation to do any-

[12]Respondents argue that the due process requirements of the LMRDA [29 U.S.C. §411 (a) (5)] and Article III, Section 3 of the UMWA Constitution (Pl. Ex. 34), require such time consuming and cumbersome procedures that the imposition of fines, revocation of charters, appointment of a provisional government for a local, or other means of attempting to secure contract compliance by members or locals, is too slow a process to be effective. (Respondents' brief, pp. 44-45) However, it is not necessary that such measures be consumated immediately or during the existence of a relatively brief strike. Knowledge that UMWA talk about taking such measures is not an idle threat, and that such consequences are a real probability, would produce the same effect. Unions do effectively employ such procedures against members who act contrary to union policy, when motivated to do so. See: *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967); and *NLRB v. The Boeing Co.*, 412 U.S. 67 (1973).

[13]UMWA likewise repeats the misconception, which permeates its brief, that the all reasonable means obligation necessarily imposes upon it an absolute obligation to exercise internal disciplinary powers in the event of a wildcat strike (R.B. 15).

thing with regard to wildcat strikes (R.B., pp. 15-20); and (2) that the pertinent contracts were negotiated against a background of consistent Court decisions which preclude a conclusion that the parties intended that UMWA could have any obligation to take any action with regard to wildcat strikes. Because each of those assumptions is erroneous, UMWA's conclusion is erroneous. Moreover, the interpretation urged by UMWA provides no real meaning for the language relied upon by Carbon — the express duty of the parties to "maintain the integrity of the contracts." If that language is to have any meaning, it must have the meaning attributed to it by Carbon.

1. THE BARGAINING HISTORY SUPPORTS RATHER THAN PRECLUDES AN IMPLIED OBLIGATION UPON UMWA TO USE ALL REASONABLE MEANS TO PREVENT AND TERMINATE WILDCAT STRIKES.

UMWA relies upon but a portion of the contract changes made in the 1947-1952 period. For the complete description of those changes, see Carbon's original brief, pages 30-34. UMWA ignores the effect of the deletion of the "able and willing" language, which was placed in the contract in 1947 for the purpose of denying any obligation on the part of UMWA to see to it that its members worked. See Carbon's original brief, p. 31 (n.1). More importantly, UMWA gives only an illusory and meaningless import to the inclusion of the maintenance of integrity language. R.B., p. 18, 19. Only by restricting its view to those changes in the contract which support its positions can UMWA draw its conclusion.

Upon review of the entire history, as accurately reported in *International U., UMWA*, (Boone County

Coal Corp)[14] 117 NLRB 1095 (1957), can the effect of the changes relied upon by UMWA be discerned. From that complete history, it is apparent that the 1947 deletion of the "best efforts through available disciplinary measures" language reflects no purpose that UMWA be free of all obligation to do anything about wildcat strikes. It reflects only a purpose to relieve UMWA of an obligation to use its internal disciplinary measures in each instance, to the exclusion of other means of ending such strikes, and to afford it flexability to use such other means when it is reasonable to do so.

The denial of an all reasonable means obligations renders the integrity language meaningless. The promise to "maintain the integrity of [the] contract and that all disputes and clauses which are not settled by agreement shall be settled [through the grievance arbitration procedure]" simply cannot be reduced to an "intention to refrain from actions which might frustrate or undermine the grievance procedures" (R.B. 18). The language reflects a positive, rather than passive, obligation. It is clearly not a mere commitment to refrain from action. It is a commitment to action.

Therefore, the net effect of the deletion of the "best efforts through available disciplinary measures" requirement, while retaining the "maintain the integrity of the contract" language, was to require the UMWA to take affirmative action to prevent and end strikes, while not requiring that the action taken consist in all cases of the

[14]Although this decision was denied enforcement by the Circuit Court of Appeals for the District of Columbia, *International Union v. NLRB*, 257 F.2d 211 (D.C. Cir. 1958), that denial was not based upon any finding by the Court that the facts found by the Board were erroneous, but because the D. C. Circuit made a now patently erroneous conclusion of law that there was no implied no-strike clause in the Agreements. See *Gateway Coal Co. v. UMWA*, 414 U.S. 368 (1974).

use of available disciplinary measures. In effect, the International and Districts were thenceforth required to use whatever available means of combating strikes were reasonable under the particular circumstances of each strike.

In like manner, the deletion of the express no-strike clause cannot logically have the meaning ascribed to it by UMWA—as insulating UMWA from liability for wildcat strikes. The deletion of the express no-strike clause cannot logically be said to affect, or be intended to affect, the responsibility of the various tiers of UMWA for strikes. The obvious intent and effect of that deletion was to provide that certain strikes over nonarbitrable issues were not violations of the contract. This Court commented on the effect of the very language relied upon by UMWA (R.B. 19) in *Gateway Coal Co. v. UMWA, supra,* 414 U.S. at 384, n. 15, and said:

> This [language] effectively rescinds certain no-strike clauses in two prior agreements. It does not, however, purport to negate any no-strike duty created by the present agreement.

With all respect, it is submitted that the apparently contrary dicta in *Lewis* v. *Benedict Coal Corp.*, 259 F.2d 346, 351 (6th Cir. 1958), and in a case following it, *Old Ben Coal Corp., v. Local 1487, UMWA,* 457 F. 2d. 162, 165. (7th Cir. 1972), simply does not make sense. Each Court stated, in effect:

> In addition [to preserving the right to strike as to non arbitrable matters] the language protects the Union from liability for spontaneous or 'wildcat' strikes, *which would be the kind of work stoppages subject to the settlement procedures of the agreement.* (Emphasis Supplied) [*Old Ben, supra,* 457 F.2d at 165]

Neither Court pointed out how wildcat stoppages would

be resolved through the settlement procedures, and Carbon has no conception of how that could be accomplished.

2. DECISIONS PRIOR TO NEGOTIATION OF THE CONTRACTS DID NOT REQUIRE AN INTERPRETATION THAT UMWA WAS NOT LIABLE FOR WILDCAT STRIKES.

UMWA argues (R.B. pp. 20-24) that the "law relating to the 1968 and 1971 Agreements when they were made plainly rejected UMWA liability for wildcat strikes." R.B. p. 23. Assuming, without proof, that the parties took prior court decisions into consideration in negotiating the Contracts (there is nothing in the record to suggest that they did), the law on this subject was far from clear. UMWA relies upon *United Construction Workers v. Haislip Baking Co.*, 223 F. 2d 872 (4th Cir. 1955), *Lewis* v. *Benedict Coal, supra,* and *International Union UMWA* v. *NLRB, supra,* for its "judicial gloss." Those cases constitute a slim reed upon which to rely for such "gloss." First *Haislip, supra,* was decided upon a contract identical in pertinent part to the 1947 National Bituminous Coal Wage Agreement (A. 174-150). Hence the Contract involved in *Haislip* did *not* contain the "integrity" language, and *did* contain the "able and willing" clause. *Benedict Coal's* language relied upon by UMWA is, as respectfully pointed out *supra,* incomprehensible *dicta.* Finally, the D. C. Circuit's opinion in *International Union* would, according to UMWA's reasoning, require a conclusion that the parties bargained the relevant language knowing that there was *no* no-strike obligation at all—only a mere "gentlemen's agreement." See Carbon's Brief in Chief, at p. 34. Indeed, after this Court's decision in *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U.S. 95 (1962), which inevitably foreshadowed its decision in *Gateway Coal, supra,* that the implied no-strike obli-

gation is not a "gentlemen's agreement," but a binding commitment, one would have expected the parties to subsequent negotiations to take seriously the conclusion in *International Union, supra,* that the integrity language creates an obligation on the part of UMWA to take affirmative action to *"induce or coerce [their members and subordinant branches] to refrain from striking."* 257 F.2d at 218. (Emphasis Supplied)[15]

Finally, UMWA relies upon *Blue Diamond Coal Co. v. UMWA,* 436 F.2d 551 (6th Cir. 1970), *cert. denied* 402 U.S. 930 (1971), a case decided in the last year of the 1968 Agreement. The Court in that case was not called upon to determine whether the "integrity" language implied any affirmative obligation upon UMWA. The portion relied upon by UMWA is wholly *dicta,* for in *Blue Diamond,* the Court affirmed a holding of UMWA liability, albeit on an agency theory.

Even if there were some merit to UMWA's claim of a background of unanimous decisions absolving it from any responsibility to do anything to enforce the performance of the contractual promises it made, such a claim should not preclude this Court from deciding this case in accordance with its view of what is right. This Court did so in *Gateway, supra,* in implying a no-strike clause from the mandatory grievance procedure, despite decisions to the contrary. There is simply no evidence in the record whereby one can conclude that the contracts were

[15]UMWA clearly recognized, as has been clear, that wildcat strikes in violation of the agreements have had the effect of imperiling the "integrity of the contract[s]." In its resolution, adopted in September, 1966, the UMWA supported the last in its series of formal threats to discipline responsible members for bringing about or prolonging such strikes by a resolution (A. p. 188) that:

> "willfull and ill-advised [strikes in violation of the contracts] on the part of local unions and individual members imperils the welfare of all members of the union and threatens the *integrity* of the joint contractual relationship in the coal industry." [Emphasis Supplied]

entered into with the understanding that any one or more previous Court decisions had established and settled the law as it was then and forever would be.

IV. CONCLUSION

The judgment of the Court of Appeals, insofar as it reversed the judgments against the District and International relative to the thirty-one strikes over arbitrable issues, should be reversed.

Respectfully submitted,

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